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Form and Function: Federal Standing since Warth v. Seldin

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COMMENTS

FORM AND FUNCTION: FEDERAL STANDING SINCE *WARTH V. SELDIN*

INTRODUCTION

The late 1960's and early 1970's witnessed a dramatic move toward liberalized standing in the federal courts.[1] More recently, the Supreme Court has endeavored to curb that trend by reaffirming basic standing principles.[2] In *Warth v. Seldin*[3] and *Simon v. Eastern Kentucky Welfare Rights Organization*[4] the Court elevated minimal constitutional criteria to the position of a formidable standing barrier.[5] These cases have given rise to a new constitutionally based test aimed at confining the judiciary to its intended role. The distinguishing feature of this new test is that it treats causation and effective relief as controlling elements. Previous standing decisions have not reflected this overriding concern with either the causal relationship between the defendant's alleged action and the plaintiff's injury or the court's ability to forge an adequate remedy.

The standing approach outlined in *Warth* and *Eastern Kentucky* marks a shift away from the recent focus on the adversary context of a suit toward a stricter separation of pow-

1. *See* Davis, *The Liberalized Law of Standing*, 37 U. CHI. L. REV. 450 (1970); Comment, *Standing and Sovereign Immunity: Hurdles for Environmental Litigants*, 12 SANTA CLARA LAW. 122 (1972).

2. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208 (1974); United States v. Richardson, 418 U.S. 166 (1974).

3. 422 U.S. 490 (1975).

4. 426 U.S. 26 (1976).

5. The basic element of constitutional standing is "injury in fact." Such injury originally had to be economic, but later cases have included noneconomic (i.e., aesthetic, conservational, recreational) injury within the concept. *See, e.g.*, Scenic Hudson Preservation Conference v. Federal Power Comm'n, 354 F.2d 608, 616 (2d Cir. 1965), *cert. denied*, 384 U.S. 941 (1966). This trend was reinforced by Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970), which established a two-pronged standing test. The first part of the test required that the plaintiff allege that the challenged action had caused him injury in fact, and the second that the interest sought to be protected was "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *Id.* at 151, 153. Generally, courts interpreted the *Data Processing* test so liberally that almost any allegation of injury was enough to satisfy the test. *See* 13 C. WRIGHT, A. MILLER, & E. COOPER, FEDERAL PRACTICE AND PROCEDURE § 3531, at 169 (1975) [hereinafter cited as WRIGHT].

ers analysis.[6] It has even been suggested that the latter has emerged as the sole constitutional standing requirement.[7] This view does not yet prevail among all members of the Court,[8] and there are good reasons for believing that it will not.[9] Nevertheless, it appears likely that future cases will increasingly employ standing as a means of maintaining a proper balance between the judiciary and the other branches of government.

In addition to striking this balance, the new criteria lend much needed clarity to the law of federal standing. Standing doctrine has always been difficult to apply, with the result that it has often failed to perform its intended function of screening out unsuitable plaintiffs. Even though it is not yet applied with mechanical precision, the new test appears to dispel much of this confusion. Any difficulties flowing from this lack of precision will undoubtedly be minimized as court and counsel become more familiar with the parameters of the criteria laid down in *Warth* and *Eastern Kentucky*.

After briefly analyzing the basic principles of standing, this comment will provide a comprehensive examination of the new standing test.[10] Initially, this examination will focus on the theoretical and functional foundations for both *Warth* and *Eastern Kentucky*. Following this discussion, it will investigate the lower court decisions which have attempted to determine the scope of the new test and the difficulties they have encountered in applying it. Finally, this comment will suggest some possible resolutions of these difficulties in light of the present state of standing law.

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6. *See* United States v. Richardson, 418 U.S. 166, 181 (1974); Sierra Club v. Morton, 405 U.S. 727, 732 (1972); Flast v. Cohen, 392 U.S. 83, 101 (1968); Baker v. Carr, 369 U.S. 186, 204 (1962).

7. *See* Singleton v. Wulff, 428 U.S. 106, 124 n.3 (1976) (Powell, J., concurring and dissenting).

8. *See* note 89 and accompanying text *infra*.

9. Justice Brennan, at least, is committed to the adversary context approach. *See* text accompanying notes 85-89, 113 *infra*.

10. A truly comprehensive standing analysis is not within the scope of this work. As Justice Frankfurther observed, standing is a "complicated speciality of federal jurisdiction, the solution of whose problems is in any event more or less determined by the specific circumstances of individual situations . . . ." United States *ex rel* Chapman v. Federal Power Comm'n, 345 U.S. 153, 156 (1953). For a fuller discussion of standing, see K. DAVIS, ADMINISTRATIVE LAW OF THE SEVENTIES § 22.00 (1976); K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22 (1958 & Supp. 1970) [hereinafter cited as DAVIS TREATISE]; WRIGHT, *supra* note 5, at 175-237.

BASIC STANDING PRINCIPLES

Generally speaking, standing focuses on the party raising an issue and not on the issue raised:[11]

> [T]he question of standing . . . is the question whether the litigant has a sufficient personal interest in getting the relief he seeks, or is a sufficiently appropriate representative of other interested persons, to warrant giving him the relief, if he establishes the illegality alleged—and, by the same token, to warrant recognizing him as entitled to invoke the court's decision on the issue of illegality.[12]

Consequently, standing is seldom an issue except in cases concerning administrative action,[13] the constitutionality of a statute,[14] or other areas of public law.[15] In private actions, there is rarely any doubt as to the interest of a party, or the propriety of his representative capacity.[16]

Standing consists of two separate concepts which are clearly defined in theory, but which are not always distinguished in practice. The first of these is the "irreducible"[17] requirement imposed by article III of the Constitution, that federal courts decide only "cases and controversies."[18] The second is the set of "prudential"[19] limitations imposed by the courts themselves as rules of "judicial self-restraint."[20] The

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11. *See* Flast v. Cohen, 392 U.S. 83, 99-100 (1968). *But see* notes 139-140 and accompanying text *infra*.

12. HART & H. H. WECHSLER, THE FEDERAL COURTS AND THE FEDERAL SYSTEM 156 (2d ed. 1973).

13. *See, e.g.*, United States v. SCRAP, 412 U.S. 669 (1973); Sierra Club v. Morton, 405 U.S. 727 (1972); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970).

14. *See, e.g.*, Linda R. S. v. Richard D., 410 U.S. 614 (1973).

15. *See* WRIGHT, *supra* note 5, at 176.

16. *Id.*; K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22, at 722 (Supp. 1970).

17. United States v. Richardson, 418 U.S. 166, 181 (1974).

18. Art. III, § 2 of the Constitution of the United States reads as follows:
> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State;—between Citizens of different States;—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

19. Warth v. Seldin, 422 U.S. 490, 500 (1975).

20. Barrows v. Jackson, 346 U.S. 249, 255 (1953).

"case or controversy" requirement is essentially immutable, while the prudential limitations are subject to the court's discretion and to congressional modification.

Case or Controversy

The nature and function of the article III "case or controversy" limitation on the federal judiciary has not yet been conclusively defined. One commonly propounded tenet, traceable back at least as far as *Muskrat v. United States,*[21] and clearly articulated in *Flast v. Cohen,*[22] is that "those words limit the business of federal courts to questions presented in an adversary context and in a form historically viewed as capable of resolution through the judicial process."[23] The *Flast* court also set forth a view reemphasized in *Warth, Eastern Kentucky,* and their immediate antecedents. This was that "in part those words define the role assigned to the judiciary in a tripartite allocation of power to assure that the federal courts will not intrude into areas committed to the other branches of government."[24] At various times, priority has been given to one or the other of these considerations, but they are consistently accepted, at least by the courts, as the foundation of constitutional standing.[25]

Prudential Limitations

Prudential limitations, invoked by a court, may deny a litigant access to the federal judicial system even if he presents a "case or controversy" as mandated by article III. These court-made standing rules are most frequently applied in two distinct factual situations. In the first, even though a plaintiff asserts a harm which satisfies the article III standard, he may not be granted standing if the alleged injury is a "generalized grievance" shared by a large class of citizens.[26] In the second, a plaintiff who passes the constitutional test will nevertheless be

21. 219 U.S. 346 (1911).

22. 392 U.S. 83 (1968).

23. *Id.* at 95.

24. *Id.*

25. Some authorities feel that the adversary context requirement is not properly an element of standing. *See, e.g.*, DAVIS TREATISE *supra* note 10, § 22.00-4, at 723-24 (Supp. 1970); Scott, *Standing in the Supreme Court—A Functional Analysis*, 86 HARV. L. REV. 645, 674 (1973).

26. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 208, 217 (1974); United States v. Richardson, 418 U.S. 166, 171-73 (1974); Frothingham v. Mellon, 262 U.S. 447, 487-88 (1923).

restricted to asserting his own rights and not those of third parties, except in unique circumstances.[27]

The purposes behind these prudential limitations are much the same as those which shape the article III criteria. Generally, the courts are both attempting to insure that cases will be vigorously and competently presented and seeking to prevent judicial encroachment into areas more amenable to legislative treatment.[28] Of less significance is the desire to avoid opening the courts to a flood of litigation by over-enlarging the class of potential plaintiffs.[29] Although the prudential rules serve more or less the same purposes as those imposed by article III, they go beyond it, permitting the courts to confine themselves to their perceived role in the circumstances of a particular dispute.

In addition to these court created limitations, the prudential aspects of standing are shaped to a large extent by congressional power over them. Subject to the minimum article III requirements, Congress can grant standing as it sees fit to challenge alleged violations of federal statutes.[30] This congressional power does not alter the basic structure of the standing doctrine, since it effectively removes most of the impetus for judicial self-restraint.[31] It simply raises the additional question of whether a litigant falls within the class to which Congress intended to grant standing.[32] Thus, in all cases involving the

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27. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Warth v. Seldin, 422 U.S. 490, 499 (1975); WRIGHT, *supra* note 5, at 206. Note, *Standing to Assert Constitutional Jus Tertii*, 88 HARV. L. REV. 423 (1974).

28. *See* Warth v. Seldin, 422 U.S. 490, 499-500 (1975).

29. This fear of an overwhelming burden on the judicial system has been shown to be a minor, or even nonexistent problem not worthy of separate consideration in the standing analysis. K. DAVIS, ADMINISTRATIVE LAW TREATISE § 22, at 724 (Supp. 1970); Scott, *supra* note 25, at 672-74.

30. By far the broadest of such legislative enactments is the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-706 (1966). Numerous standing cases have been decided under § 702 of the APA which reads: "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." *See, e.g.*, Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); Association of Data Processing Serv. Orgs., Inc. v. Camp, 397 U.S. 150 (1970). Congress can also create rights by statute, the violation of which results in injury in fact. *See, e.g.*, Warth v. Seldin, 422 U.S. 490, 501 (1975).

31. Prudential standing limitations are primarily designed to restrict the judiciary to its proper role. When Congress grants standing in a particular area into which the judiciary might otherwise hesitate to venture, the proper distribution of power is maintained and the need for judicial self-restraint is reduced. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976); WRIGHT, *supra* note 5, at 236.

32. Under § 702 of the APA the relevant inquiry focuses on who is a person aggrieved within the meaning of a statute. *See* note 30 *supra*. Prior to *Eastern*

violation of federal statutes, the courts must include the possibility of statutory standing in their review of prudential considerations.[33]

Against this backdrop of basic standing principles, *Warth* and *Eastern Kentucky* were decided. In order to fully comprehend the parameters of the standing test they developed, it is necessary to examine both cases in some detail. This will be accomplished by first, setting the factual background of each case; and second, scrutinizing the theoretical foundations of each case by construing both cases in light of the relevant precedents. Finally, each case will be analyzed from a functional perspective, revealing some practical considerations which may have moved the Court to establish the new test.

THE NEW TEST

Factual Background

Warth v. Seldin.[34] In *Warth* the petitioners sought standing to challenge alleged exclusionary zoning practices in the Town of Penfield, New York. The individual petitioners were taxpayers and a number of persons of low or moderate income, who also were members of racial or ethnic minority groups, in the nearby city of Rochester. They claimed that Penfield's zoning ordinance, as written and enforced, excluded persons of low and moderate income from living in the town, and thereby violated petitioners' first, ninth, and fourteenth amendment rights and 42 U.S.C. sections 1981, 1982, and 1983. In addition, two of the petitioning organizations alleged an interest in promoting the construction of low and moderate cost housing in the Rochester area, and a third intervened as the representative of builders and developers who sought to construct such housing in Penfield.

For purposes of this discussion, the most pertinent portion of the *Warth* opinion concerned the Court's treatment of the individual petitioners' standing claims. While assuming that the ordinance and its enforcement did effect the exclusion of

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Kentucky the Court answered this question in terms of the two-pronged *Data Processing* test. *See* note 5 *supra*. Now it appears that a claimant under the APA must not only show injury in fact, but must also allege that such injury resulted directly from the challenged action and that it is likely to be redressed by a favorable decision. *See* Simon v. Eastern Kentucky Welfare Rights Org., 426 U.S. 26 (1976).

33. *See* Scott, *supra* note 25 (discussing the distinction between statutory and nonstatutory standing review).

34. 422 U.S. 490 (1975).

persons of low or moderate income from residence in Penfield, the Court nevertheless observed that the mere fact that petitioners shared attributes with persons whose rights may have been violated was not enough to afford them standing to sue:

> Petitioners must allege facts from which it reasonably could be inferred that, absent the respondents' restrictive zoning practices, there is a substantial probability that they would have been able to purchase or lease in Penfield and that, if the court affords the relief requested, the asserted inability of petitioners will be removed.[35]

The majority concluded that petitioners failed to make these essential allegations.[36]

The individual petitioners did not claim that the ordinance affected them directly, but rather that its enforcement against builders and developers prevented construction of suitable housing at affordable prices.[37] Indirectness of injury, the Court noted, did not preclude standing, but it "may make it substantially more difficult to meet the minimum requirement of Art. III: to establish that, in fact, the asserted injury was the consequence of the defendants' actions, or that prospective relief will remove the harm."[38] Here, the Court said, there was no indication that any proposed projects would suit petitioners' needs at prices they could afford, and those needs, together with petitioners' financial positions suggested that the cause of their difficulties was the economics of the local housing market rather than the challenged ordinance.[39] Furthermore, there was only a "remote possibility" that petitioners' position would improve if the requested relief was granted.[40]

The court summarized its discussion of the position of the individual petitioners by stating that: "We hold only that a plaintiff who seeks to challenge exclusionary zoning practices must allege specific, concrete facts demonstrating that the challenged practices harm *him,* and that he personally would benefit in a tangible way from the court's intervention."[41] This statement was qualified somewhat in a footnote which explained that the plaintiff need not have a present contractual

35. *Id.* at 504.
36. *Id.*
37. *Id.*
38. *Id.* at 505.
39. *Id.* at 506.
40. *Id.* at 507.
41. *Id.* at 508.

interest in a specific project.[42] A "particularized personal interest" is enough. However, the "initial focus" should usually be on a particular project in this type of exclusionary zoning case.[43]

Simon v. Eastern Kentucky Welfare Rights Organization.[44] In *Eastern Kentucky* the respondents sought standing to challenge an Internal Revenue Service Ruling granting favorable tax treatment to non-profit hospitals providing only emergency room services to indigents. They were an unincorporated association and several non-profit corporations which represented the interests of indigent persons in obtaining hospital services and twelve individuals who claimed that they existed below the poverty level and suffered from conditions requiring hospital care. The disputed ruling modified a previous one which had required non-profit hospitals to provide free services to indigents to "the full extent of its financial ability" in order to receive charitable status.[45] In contrast, the new ruling accorded "charitable" status to a hospital designated Hospital A, and described that institution as providing only emergency room services to indigents. In addition, the new ruling expressly removed from the prior one the requirements relating to caring for patients without charge or at rates below cost.[46]

The complaint alleged that the new ruling violated both the Internal Revenue Code (IRC)[47] and the Administrative Procedure Act (APA).[48] The respondents sought relief as persons aggrieved under section 10 of the APA and as the intended beneficiaries of the IRC sections granting favorable tax treatment to charitable organizations.[49] They asserted that the new ruling encouraged hospitals to deny services to indigents and thereby injured respondents in their opportunity and ability to receive services in non-profit hospitals. Each individual respondent described a situation in which he or a member of his family had been denied services at a hospital because of indigency and alleged that the hospitals involved had tax exempt status.

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42. *Id.* at 508 n.18.
43. *Id.*
44. 426 U.S. 26 (1976).
45. Rev. Rul. 185, 1956-1 C.B. 202.
46. Rev. Rul. 545, 1969-2 C.B. 117.
47. 426 U.S. at 33-34.
48. *Id.*
49. *Id.* at 47 (Brennan, J., dissenting); *see* notes 30 & 32 *supra*.

The Court's treatment of both the individuals' and organizations' standing claims in *Eastern Kentucky* merits attention. In dealing with the organizations, the Court cited *Warth* and *Sierra Club v. Morton*,[50] observing that an organization's abstract concern with a problem is not a substitue for the concrete injury required by article III. Therefore, the organizations could sue only as representatives of those of their members who had suffered injury in fact.[51] Thus, the standing question depended upon whether any of the individual respondents or the indigent organization members could establish actual injury.

In treating the interests of the individual respondents, the Court acknowledged that they had suffered injury to their access to hospital services as a result of indigency. Since no hospital was a defendant, however, such injury was not sufficient to establish a case or controversy in the context of the suit.[52] The Court noted the liberalization of standing law in recent years, but insisted that the "case or controversy" requirement of article III, "that a federal court act only to redress injury that fairly can be traced to the challenged action of the defendant, and not injury that results from the independent action of some third party not before the court," still remained.[53]

Whether the denials of service referred to in the complaint could be traced to Internal Revenue Service (IRS) encouragements was deemed entirely speculative. Such denials could also result from decisions made by the hospitals independent of the new tax ruling. Whether granting the requested relief would result in those services being provided was considered equally speculative. Because of this, the individual respondents were found to lack the necessary standing.[54] "[U]nadorned speculation," the Court concluded, "will not suffice to invoke the federal judicial power."[55]

Theoretical Foundation

Justice Brennan argued in his concurring and dissenting opinion in *Eastern Kentucky*, that the majority's decision was "clearly contrary to the relevant precedents."[56] Although the

50. 405 U.S. 727 (1972).
51. 426 U.S. at 40.
52. Suit was brought against the Secretary of the Treasury and the Commissioner of Internal Revenue.
53. 426 U.S. at 41-42.
54. *Id.* at 42-43.
55. *Id.* at 44.
56. *Id.* at 46.

same could be said about *Warth,* perhaps a more accurate statement would be that these two cases go considerably beyond any previous applications of direct injury in fact as a standing test. Other cases have turned on whether the plaintiff's injury occurred as a consequence of the defendant's allegedly illegal actions and whether the Court could, or should, remedy the situation by granting the requested relief. Generally, these minimum requirements have been easily met.[57] In the context of *Warth* and *Eastern Kentucky,* however, the elements of direct injury and effective relief emerged as substantial obstacles to standing. One convenient way to assess the validity of this shift in emphasis is to examine the judicial precedents the majority relied on in developing its new theory.

Linda R.S. v. Richard D. In both *Warth* and *Eastern Kentucky,* Justice Powell's majority opinions relied on *Linda R.S. v. Richard D.*[58] for the proposition that unadorned speculation will not suffice to invoke the federal judicial power.[59] In that case, the mother of an illegitimate child challenged a state court construction of a Texas statute providing for punishment of parents who failed to support their children. She sought to compel enforcement of the statute against her child's alleged father, and claimed that the state court ruling, which limited the effect of the statute to parents of legitimate children, violated the equal protection clause.

The Supreme Court, in an opinion by Justice Marshall, held that she lacked standing. Quoting *Massachusetts v. Mellon,*[60] the Court said that a party seeking to invoke the power of the federal courts to invalidate a statute must be able to show "that he has sustained or is immediately in danger of sustaining some direct injury as the result of [its] enforcement."[61] The Court considered it entirely speculative that enforcement of the statute would result in the payment of support rather than in the jailing of the father.[62]

Justice Brennan's dissent in *Warth* attempted to distinguish *Linda R. S.* In a footnote, he argued that in *Linda R. S.,* even if everything alleged were proved at trial, it would still be

57. *See, e.g.,* United States v. SCRAP, 412 U.S. 669 (1973); Ash v. Cort, 496 F.2d 416, 420 (3d Cir. 1974), *rev'd,* 422 U.S. 66 (1975) (without reaching standing question); Boyd v. Gullet, 64 F.R.D. 169, 172 (D. Md. 1974).

58. 410 U.S. 614 (1973).

59. 426 U.S. at 44.

60. 262 U.S. 447 (1923) (decided with Frothingham v. Mellon).

61. 410 U.S. at 618.

62. *Id.*

impossible to show that the alleged father would be prosecuted, or if prosecuted, that he would contribute to the support of his children.[63] In *Warth,* he continued, the situation was otherwise: "Here, if these petitioners prove what they have alleged, they will have shown that respondents' actions did cause their injury."[64] Thus, in *Linda R.S.* effective relief depended on the actions of third parties, an element absent in *Warth.*

The element of third party discretion creates a close parallel between *Linda R.S.* and *Eastern Kentucky,* but a distinction between the former and *Warth* can be made along the lines drawn by Justice Brennan.[65] On the one hand, in *Linda R.S.* no evaluation of the merits could determine whether the child's father would choose to pay support or go to jail. On the other hand, in *Warth,* if no external factors were involved, the willingness of the developers to construct low and moderate cost housing would forge the required causal link between the challenged ordinance and petitioners' alleged injury. However, external factors were present which weakened this causal link and dissuaded the majority from concluding that effective relief could be granted.[66]

Justice Brennan did not ignore the causation-relief problems in *Warth.* Instead, he argued that they should be answered in the process of adjudicating the merits of the dispute. Lack of specificity in the pleadings, he said, should not deny petitioners the opportunity to substantiate their claim.[67]

Justice Brennan's argument is well reasoned, but it appears to be more a product of his liberal approach to standing than a strict application of the theory and policy behind the doctrine.[68] The core of the standing question is always whether or not the plaintiff is a proper party to bring the action. Justice Brennan's approach makes this important threshold determination dependent on the plaintiff's success on the merits.

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63. 422 U.S. at 526 n.5.

64. *Id.*

65. Clearly, in *Eastern Kentucky* the hospitals could have provided the services called for by the Regulation or discontinued them and forgone charitable status. *See* text accompanying notes 54-55 *supra.*

66. For example, in *Warth* it was unclear if it was economically feasible to build the housing and, even assuming construction, it was unclear whether the individuals could have afforded it. *See* text accompanying notes 35-40 *supra.*

67. 422 U.S. at 527.

68. Justice Brennan would limit the standing analysis to the question of whether the plaintiff has alleged injury in fact. *See* Schlesinger v. Reservists Comm. to Stop the War, 418 U.S. 235 (1974) (Brennan, J., dissenting); United States v. Richardson, 418 U.S. 166 (1974).

Economic uncertainty is a quantity less easily figured into the standing equation than the fact of a third party's choice of action on which *Linda R.S.* turned. However, both factors affect the directness of injury and the effectiveness of available relief to the same degree, and they can be equated on those terms. Unless these standing criteria are to be entirely disregarded when the factual complexity of a case reaches some undefined point, the rationale of *Linda R.S.* must control. Any concomitant increase in the plaintiff's pleading burden is unfortunate but unavoidable.

The SCRAP case. The Court's brief discussion of *United States v. Students Challenging Regulatory Agency Practices (SCRAP)*[69] could have further clarified the "direct" injury in fact approach but failed to do so. In that case, SCRAP, an association of five law students, and other environmental groups challenged an Interstate Commerce Commission order allowing a surcharge on railroad freight costs. SCRAP alleged that its members used the area around Washington, D.C., breathing the air and enjoying the natural resources. The group claimed that the increased freight rate would cause a decline in the use of recycled materials, which in turn would have an adverse effect on the environment. The fact that many people might suffer the same injury did not bother the court: "To deny standing to those who are in fact injured simply because many others are also injured, would mean that the most injurious and widespread Government actions could be questioned by nobody."[70] Similarly, the opinion did not reflect great concern with the attenuated line of causation presented by the pleadings:

> Of course, pleadings must be something more than an ingenious academic exercise in the conveivable. A plaintiff must allege that he has been or will in fact be perceptibly harmed by the challenged agency action, not that he can imagine circumstances in which he could be affected by the agency's action.[71]

The Court confined its focus to the pleadings in which the appellees alleged specific and perceptible harm which distinguished them from others. The Court reasoned that if the allegations were untrue the railroad should have moved for sum-

69. 412 U.S. 669 (1973).
70. *Id.* at 688.
71. *Id.* at 688-89.

mary judgment, but it would not say, based solely on the pleadings, that SCRAP's allegations were untruthful.[72]

In *Eastern Kentucky,* the circuit court concluded that *SCRAP* supported the respondents' standing,[73] but the majority of the Supreme Court found this determination erroneous. It observed that the complaint in *SCRAP* "alleged a specific and perceptible harm flowing from the agency action and distinguished the complaint in *Eastern Kentucky* as "failing to allege an injury that fairly can be traced to petitioners' challenged action."[74]

Actually, the line of causation in *SCRAP* was so attenuated that it is very doubtful that it could have passed the test expounded in *Warth* and *Eastern Kentucky.*[75] However, the fact that neither of the latter decisions is entirely consistent with the result in *SCRAP* should not be seen as detracting from the new approach. Standing has had such a variegated history that absolute consistency would no doubt be difficult to achieve at this juncture. It is better to view the Court's treatment of causation in *SCRAP* as its last effort on behalf of liberalized standing before adopting the more stringent approach which led to the direct injury-effective relief standard.[76]

In another dimension, *SCRAP* remains an important part of the standing analysis. A crucial portion of that decision focused on the degree of harm necessary to constitute particularized injury, and in this respect it has proved invaluable in defining the scope of the new standing test.[77] *SCRAP* stands for the proposition that the effect of an injurious action can be considerably diffused without precluding standing to challenge it. Even cases admitting the lack of direct injury in *SCRAP* have cited it favorably in opining that minimal injury will support standing.[78]

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72. *Id.* at 689-90.

73. 426 U.S. at 44 n.25.

74. *Id.*

75. *See* Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388, 390 (1st Cir. 1977). It has been argued that the Court's leniency in *SCRAP* stemmed from the fact that the standing question arose on a motion to dismiss on the pleadings. *See* Comment, *Standing to Sue in Federal Courts: The Elimination of Preliminary Threshold Standing Inquiries,* 51 TUL. L. REV. 119, 142 (1976).

76. *See* Leedes, *Mr. Justice Powell's Standing,* 11 U. RICH. L. REV. 269, 278-79, 288 (1977).

77. 412 U.S. at 686-90.

78. *See, e.g.,* Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1st Cir. 1977). *See also* Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year, 1975, 549 F.2d 1115, 1121 (6th Cir. 1977); Gray v. Greyhound Lines, East, 545 F.2d 169, 175 (D.C. Cir. 1976).

Data Processing and Barlow. The *Eastern Kentucky* Court also found the companion cases of *Association of Data Processing Service Organizations v. Camp*[79] and *Barlow v. Collins*[80] in accord with its decision. To the extent that these cases also involved alleged injury resulting from governmental action in regard to a third party they are pertinent to the situation in *Eastern Kentucky.* In both *Data Processing* and *Barlow* the Court found that the plaintiffs had standing to challenge the actions of government officials. Injury in both cases was clearly direct, and this was the point emphasized by the *Eastern Kentucky* Court in distinguishing them.[81]

However, very little is added to *Eastern Kentucky* by observing the theoretical congruence described. Both *Data Processing* and *Barlow* are more significant for their liberal analysis of standing under the APA.[82] As one commentator observed, the Court's treatment of the *Data Processing* injury in fact test has "reduced it to little more than a bar against suit by intellectually or emotionally concerned bystanders."[83] In both *Data Processing* and *Barlow*, the directness of injury was scarcely questioned, and those decisions would seem to cut the other way. It is more significant to note that if *Eastern Kentucky* had been decided under the *Data Processing* direct injury-zone of interest test, the result would probably have been different.[84]

Functional Analysis

A functional analysis of the standing criteria applied in *Warth* and *Eastern Kentucky* provides a more satisfactory explanation for those decisions than do the informative but inconclusive precedents cited by the Court. The pre-*Warth* emphasis on the adversary context of a dispute cannot explain the

79. 397 U.S. 150 (1970); *see* note 82 *infra.*

80. 397 U.S. 159 (1970); *see* note 82 *infra.*

81. 426 U.S. at 45 n.25.

82. *Data Processing* established a two part standing test which required (1) injury in fact, and (2) that the interest sought to be protected be "arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question." *See* note 5 *supra.* In *Barlow*, the Court made the broad statement that "only upon a showing of 'clear and convincing' evidence of a contrary legislative intent" should the courts restrict access to judicial review of administrative action. 397 U.S. at 167.

83. WRIGHT *supra* note 5, at 196. *See also* Sedler, *Standing, Justiciability, and All That: A Behavioral Analysis*, 25 VAND. L. REV. 479 (1972).

84. *See* 426 U.S. at 58 (Brennan, J., concurring and dissenting).

result reached in these latter cases, and it is therefore understandable that the decisions employing that approach should fail to support unequivocally the direct injury and effective relief requirements. A more substantial foundation for the new test is apparent in the Court's growing concern with the proper role of the judiciary as the constitutional basis of standing.

Adversary context of the dispute. As early as *Muskrat v. United States,*[85] the personal interest of the plaintiff in the outcome of the litigation was considered an important element of standing. With *Baker v. Carr,*[86] a sufficient stake in the outcome of the controversy "as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional questions"[87] became the dominant constitutional consideration. Even Justice Powell, the author of the *Warth* and *Eastern Kentucky* opinions, acknowledged in his concurring opinion in *United States v. Richardson* that the personal interest test was the "controlling definition of the irreducible Art. III case-or-controversy requirements for standing."[88] This view has not totally lost sway. Justice Brennan's concurring and dissenting opinion in *Eastern Kentucky* repeatedly emphasizes that "concrete adverseness flowing from a personal stake in the outcome" is the *only* constitutional criteria governing standing.[89]

Separation of powers. The majority opinions in *Warth* and *Eastern Kentucky* clearly mark a shift away from the adversary context approach and toward a standing doctrine based on separation of powers concerns.[90] This represents a conscious

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85. 219 U.S. 346 (1911).

86. 369 U.S. 186 (1962). It is also worth noting that under *Baker,* it was not necessary to decide if the plaintiffs' claims would ultimately entitle them to any relief. *Id.* at 208; WRIGHT, *supra* note 5, at 175. This, of course, is contrary to the position adopted by the Court in its "effective relief" portion of the new test.

87. 369 U.S. at 204.

88. 418 U.S. 166, 181 (1974).

89. 426 U.S. at 52-53, 56, 59 n.7, 60.

90. Chief Justice Warren said in his majority opinion in Flast v. Cohen, 392 U.S. 83 (1968), that separation of powers tests were not to be read into standing concepts:

> The question whether a particular person is a proper party to maintain the action does not, by its own force, raise separation of powers problems related to improper judicial interference in areas committed to other branches of the Federal Government. Such problems arise, if at all, only from the substantive issues the individual seeks to have adjudicated.

Id. at 100. The clarity of this observation was somewhat clouded by the subsequent efforts of the Chief Justice to incorporate personal interest criteria into a standing analysis which rightfully should have been made on other grounds. *See id.* at 116-33

move and is not simply a product of the factual contexts of those cases. Justice Powell expressly noted this in his concurring and dissenting opinion in *Singleton v. Wulff*,[91] a standing decision which came down soon after *Eastern Kentucky*. In reference to the "adversary context" test he said:

> While this concern is relevant, it should receive no more emphasis in this context [prudential] than in the context of Art. III standing requirements. Perhaps a more accurate formulation of the Art. III limitation—one consistent with the concerns underlying the constitutional provision—is that the plaintiff's stake in a controversy must insure that exercise of the court's remedial powers is both necessary and sufficient to give relief. A similar focus upon the proper judicial role, rather than quality of advocacy, is preferable in the area of prudential limitations upon judicial power.[92]

This is a significantly different position than that adopted by Justice Powell in his *Richardson* concurrence, but it is also one with substantial support in standing theory.[93]

Neither *Warth* nor *Eastern Kentucky* presented a traditional vehicle for a detailed discussion of the judicial function, and so that concept is referred to only obliquely in those cases.[94] It is nevertheless apparent that the role of the judiciary was a basic consideration in the majority's standing analysis. In *Warth*, Justice Powell introduced his discussion of standing with this statement: "In both dimensions it is founded in concern about the proper—and properly limited—role of the courts

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(Harlan, J., dissenting). *See also* WRIGHT, *supra* note 5, at 188.

The interest in separation of powers concerns as potential limits on standing actually arose before *Warth*. *See id.* at 221.

91. 428 U.S. 106 (1976).

92. *Id.* at 124 n.3 (citations omitted).

93. *See* note 88 and accompanying text *supra*.

94. The prior standing cases in which the Supreme Court has discussed the role of the judiciary at length have generally involved federal agency action, or congressional acts. *See, e.g.*, United States v. Richardson, 418 U.S. 166 (1974) (CIA); Flast v. Cohen, 392 U.S. 83 (1968) (IRS); Frothingham v. Mellon, 262 U.S. 447 (1923) (Maternity Act of 1921).

Such cases pose separation of powers problems in a much more immediate context than does *Warth*, which concerned the actions of a local legislative body. In *Eastern Kentucky*, it is at least arguable that the Court did not wish to rule on the touchy question of whether it could ever properly review an IRS Ruling at the insistence of a third party, although it may actually have answered this question in the negative nevertheless. *See* Comment, *Should Standing Stand in the Way of IRS Revenue Ruling Accountability?*, 48 U. COLO. L. REV. 95 (1976); text accompanying notes 115-116 *infra*.

in democratic society."[95] Later in the same opinion he suggested that those unhappy with zoning laws "need not overlook the availability of the normal democratic process."[96] The petitioners in *Eastern Kentucky* contended that the Court would exceed its power if it permitted suits by third parties which challenged the tax treatment of other taxpayers. The Court did not expressly reach this consideration,[97] but it clearly was a factor in its decision.[98]

Direct injury-effective relief test. Although the functional basis for the direct injury-effective relief test is not outlined in *Warth* or *Eastern Kentucky,* it is not necessary to look far back into the history of the standing doctrine to find a thorough explanation of the principles underlying the new approach. The analytic framework which supports the *Warth* and *Eastern Kentucky* decisions was clearly depicted in *United States v. Richardson*[99] and *Schlesinger v. Reservists Committee to Stop the War.*[100] Both these cases involved the standing of taxpayers or citizens to challenge government action.[101] Historically, this type of "generalized grievance"[102] did not support standing on the theory that the injury suffered by the taxpayer or citizen was too indirect.[103]

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95. 422 U.S. at 498.

96. *Id.* at 508 n.18.

97. 426 U.S. at 37; *see* note 94 *supra.*

98. Justice Stewart, concurring, agreed with petitioners. However, he based his conclusions on an undefined application of standing principles rather than on the grounds of congressional intent which they had put forth. 426 U.S. at 46.

99. 418 U.S. 166 (1974).

100. 418 U.S. 208 (1974).

101. *See generally* DAVIS TREATISE, *supra* note 10, §§ 22.09-.7 (Supp. 1970); Davis, *Standing: Taxpayers and Others,* 35 U. CHI. L. REV. 601 (1968); Jaffe, *Standing to Secure Judicial Review: Public Actions,* 74 HARV. L. REV. 1265 (1961); Jaffe, *The Citizen as Litigant in Public Actions: The Non-Hohfeldian or Ideological Plaintiff,* 116 U. PA. L. REV. 1033 (1968) [hereinafter cited as Jaffe, *Citizen as Litigant*]; Comment, *Taxpayers' Suits: A Survey and Summary,* 69 YALE L.J. 895 (1960).

102. 392 U.S. at 106.

103. This theory was first articulated in Frothingham v. Mellon, 262 U.S. 447 (1923), which until Flast v. Cohen, 392 U.S. 83 (1968), was thought to completely bar taxpayer standing.

In *Frothingham,* a taxpayer was denied standing to enjoin enforcement of the Maternity Act of 1921, which provided grants of federal funds to states wishing to institute programs to combat infant and maternal mortality. Mrs. Frothingham claimed that the Act was beyond the power of Congress to implement and that the appropriations to fund the Act would increase her tax burden and thus amount to a taking of her property without due process of law. The Court determined that her interest as a taxpayer in the use of federal monies was "minute and indeterminable" and that the injury suffered by her in that capacity was not sufficiently direct to invoke the power of the court:

The significance of *Richardson* and *Schlesinger* in relation to the new reliance on direct injury and effective relief as standing criteria lay not so much in the "direct" or "concrete" injury language to be found therein as it did in the renewed emphasis on the position of the judiciary relative to the other branches of government.[104] Chief Justice Burger noted in his majority opinion in *Richardson* that "[I]n a very real sense, the absence of any particular individual or class to litigate these claims gives support to the argument that the subject matter is committed to the surveillance of Congress, and ultimately to the political process."[105] Justice Powell then devoted an entire section of his concurrence to a comprehensive reiteration of the reasons for restricting judicial power.[106] This theme was echoed in *Schlesinger* where the Chief Justice went so far as to suggest that by exercising its powers in response to important constitutional issues raised outside the context of concrete injury, the Court would "open the judiciary to an arguable charge of providing 'government by injunction.' "[107] Put in perspective by the prior focus on these concerns, the approach to standing outlined in *Warth* and *Eastern Kentucky* is hardly the "further obfuscation of the law of standing" lamented by Justice Brennan.[108]

A further concern of Justice Brennan's *Warth* dissent,[109]

> The party who invokes the power must be able to show not only that the statute is invalid but that he has sustained or is immediately in danger of sustaining some direct injury as the result of its enforcement, and not merely that he suffers in some indefinite way in common with people generally.

262 U.S. at 488. The Court went on to discuss the fact that it had no power to review the acts of Congress per se, and to describe the circumstances under which such review is proper. It did this in terms of direct injury and the enforcement of legal rights. The language from the *Frothingham* opinion formed the basis for the "legal rights" test which imposed strict standing criteria until discredited in Baker v. Carr, 369 U.S. 186 (1962) and subsequent cases. *See* Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939); WRIGHT, *supra* note 5, at 179-82; note 135 *infra*. To complete the circle, an analogy can be drawn between the emphasis on effective relief in *Eastern Kentucky* and other recent standing cases, *see, e.g.*, Rizzo v. Goode, 423 U.S. 362 (1976), and the outmoded "legal interest" test. *See* WRIGHT, *supra* note 5, at 38 (Supp. 1976).

104. WRIGHT, *supra* note 5, at 38 (Supp. 1976).

105. 418 U.S. at 179.

106. *Id.* at 188-97.

107. *Id.* at 222. The absence of important constitutional issues in *Eastern Kentucky* suggests that Chief Justice Burger's observation may be validly extended to cases of statutory enforcement as well.

108. 426 U.S. at 46.

109. 422 U.S. at 520.

and one echoed by the commentators,[110] was that the majority was using the direct injury-effective relief test to avoid deciding difficult constitutional questions. The Court's application of the test in *Eastern Kentucky* stilled these fears. That case raised no constitutional issues whatever. The respondents asserted only a violation of their statutory rights, and, as a result, the functional basis of the direct injury-effective relief test was clarified.[111] The new test emerged not as an expedient means of avoiding complex constitutional issues, but as a useful guideline in restricting the federal judiciary to its proper role.

In essense, the separation of powers justification for imposing restraints on standing has two dimensions.[112] First, there is an inherent limitation on the competence of judicial lawmaking since adversary litigation is not designed to carry out that purpose. Second, apart from the question of competence, there is a need to reserve some matters for the political branches as a matter of democratic principle.

In the intervening third party situations found in both *Warth* and *Eastern Kentucky,* the direct injury-effective relief test closely coincides with this justification in both dimensions. The requirement that injury be causally direct serves to counterbalance the courts' essential inadequacy in dealing with problems of broad social and economic significance by reducing the question to a clear-cut case suitable for adversary resolution.[113] By the same token, focusing on the courts' ability to give meaningful relief reserves to the political branches those matters within their special competence.

Thus, in *Warth,* by analyzing the directness of the relationship between the petitioners' injury and the respondents' acts, the Court was able to conclude that the amorphous economic factors, critical to that relationship, could not be pro-

110. *See, e.g.,* WRIGHT, *supra* note 5, § 1335, at 34 (Supp. 1976); Comment, *supra* note 75.

111. Plaintiffs asserted their rights as alleged beneficiaries of the term "charitable" in I.R.C. § 501(c)(3) They also argued that the issuance of the disputed Rev. Rul., 545, 1969-2 C.B. 117, without a public hearing was a violation of the Administrative Procedure Act rulemaking procedures, 5 U.S.C. § 553 (1970).

112. WRIGHT, *supra* note 5, at 224-25.

113. *See* text accompanying notes 85-89 *supra.*

The adversary context of a dispute is not of the essence of article III standing under the new test, but it is, to use Justice Powell's term, "relevant." *See* text accompanying note 92 *supra.* Perhaps the crucial difference between the views of Justice Brennan and Justice Powell on this point is that Brennan would incorporate "adversary context" as a fixed element of the standing test, while Powell's formulation treats that concept as an end to be achieved by means of the test.

perly evaluated in the judicial arena.[114] The fact that the pertinent economics were a matter of local rather than national concern did not in any way affect the accuracy of the majority's analysis. At any level, such matters are outside the courts' competence.[115] Similarly, in *Eastern Kentucky,* by employing the effective relief test and observing that a court-ordered return to previous IRS policy could not insure increased services to the respondents, the Court impliedly conceded the Secretary of the Treasury's authority to administer the tax laws.[116]

A close analysis of *Warth* and *Eastern Kentucky* reveals the functional and theoretical considerations which spawned the direct injury-effective relief approach to standing. A convenient way to assess the actual impact of the new test is to trace its development through cases which have attempted to rely on it.

THE APPLICATION OF THE NEW TEST

The effect of the *Warth* and *Eastern Kentucky* decisions is, by now, apparent. A three part standing test has emerged, which lower courts have applied more or less uniformly. One court concisely stated the new test as follows: "Compactly put, the test for standing applicable to this case is that the plaintiff must have alleged (a) a particularized injury (b) concretely and demonstrably resulting from defendant's action (c) which injury will be redressed by the remedy sought."[117]

This clarity and consistency seems to be a product of the reiteration of the direct injury-effective relief test in *Eastern*

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114. 422 U.S. at 506 n.16.

115. This extension to the local level of the limiting principles within which the federal courts operate is also apparent in Rizzo v. Goode, 423 U.S. 362 (1976). In that case, respondents sought federal equitable relief from alleged police misconduct in the city of Philadelphia. The district court approved a comprehensive program for the handling of citizen complaints, which approval was affirmed by the court of appeals. Petitioner's sought certiorari on the grounds that the district court's action constituted an "unwarranted intrusion by the federal judiciary into the discretionary authority committed to them by state and local law to perform their official functions." *Id.* at 366. The Supreme Court reversed, basing its decision in part on the finding that the district court's order violated the principles of federalism by limiting the police department's administration of its own affairs. *Id.* at 376-80. After citing numerous instances of the federal courts' inability to enjoin state criminal proceedings, the Court observed: "We think these principles likewise have applicability where injunctive relief is sought not against the judicial branch of the state government, but against those in charge of an executive branch of an agency of state or local government such as respondents here." *Id.* at 380.

116. *See* Comment, *supra* note 94, at 96.

117. Bowker v. Morton, 541 F.2d 1347, 1349 (9th Cir. 1976).

Kentucky since several cases following in the wake of *Warth* showed that the nature of the test was not fully understood at that time.

Problems After Warth

In *American Civil Liberties Union v. FCC,*[118] the ACLU was found to have standing as the representative of its members to challenge two FCC rulings pertaining to cable television. The ACLU claimed injury to its members resulting from the failure of the FCC to maximize programming. Even though the court determined that the truth of the alleged injury could only be determined by an examination of the merits, it nonetheless chose not to follow *Warth.* Explaining its decision, the court observed that, while *Warth* had revitalized the distinct and palpable injury standing requirement it had not overruled either *SCRAP* or *Sierra Club v. Morton.*[119] In other words, the ruling followed the cases liberalizing the nature and extent of injury required for standing rather than observing the strict causation guidelines laid down in *Warth.*

By the same token, in *Malamud v. Sinclair Oil Corp.,*[120] a case decided under section 4 of the Clayton Act,[121] the court applied the *Data Processing* two-pronged standing test[122] instead of the "direct injury" approach traditionally used under the Act.[123] The "direct injury" test, identical to the concept employed in *Warth,* was said to require too much from the plaintiff at the pleading stage.[124] Its application, the court observed, allowed the court to "make a determination on the merits of a claim under the guise of assessing the standing of a claimant . . . . [T]he entire question of directness is one that must be resolved upon some factual showing."[125]

Another case which distinguished *Warth* was *Planning for People Coalition v. Du Page City, Illinois.*[126] The facts in *Planning for People* were almost identical to those in *Warth.* As the court observed, the primary difference between the cases was that in *Planning for People* the plaintiffs alleged a

118. 523 F.2d 1344 (9th Cir. 1975).
119. 405 U.S. 727 (1972).
120. 521 F.2d 1142 (6th Cir. 1975).
121. 15 U.S.C. § 15 (1970).
122. *See* note 5 *supra.*
123. 521 F.2d at 1150.
124. *Id.* at 1149.
125. *Id.* at 1150.
126. 70 F.R.D. 38 (N.D. Ill. 1976).

conspiracy between the city and developers to exclude low-cost housing projects. Both the individual plaintiffs and one of the plaintiff organizations were found to have standing to challenge the exclusionary practices. The court observed that an inference could be drawn from defendants' actions that, absent the challenged practices and the alleged conspiracy, there was a substantial probability that plaintiffs would find suitable housing.

Warth was distinguished on the basis that the possibility existed that the subject exclusion resulted from economic factors and not conspiracy. While the *Planning for People* Court recognized that anyone could circumvent *Warth* by alleging conspiracy, it concluded that it was the very requirement—that the plaintiff have a personal interest in specific property—which made such a conspiracy possible.[127]

The Impact of Eastern Kentucky

The *Eastern Kentucky* decision has reinforced the *Warth* approach to standing to such a degree that the new test now controls over prior liberal decisions and narrow factual construction. Since *Eastern Kentucky* established direct injury-effective relief as the minimum constitutional standing requirement, even in cases decided under the APA, it should preclude future opinions on the order of *Malamud,* in which the two-pronged test provided in *Data Processing* was viewed as controlling.[128] Similarly, it should help prevent the confusion which arose in *ACLU* concerning the distinction between the extent of injury and directness of injury. Finally, *Eastern Kentucky's* clear statement of the separation of powers basis for the

127. *Id.* at 47.

Another pre-*Eastern Kentucky* case in which the *Warth* criteria were not strictly observed was Middlewest Motor Freight Bureau v. United States, 525 F.2d 681 (8th Cir. 1975). In that case the court misapplied the concept of prudential standing. The appellants, several shippers, were allowed to challenge tariffs collected by appellees, motor freight carriers, during the time that an order restraining increased tariffs was in effect. Without analyzing whether the injury alleged was sufficient to support standing under *Warth,* the court found that prudential factors (10 years of litigation) outweighed the necessity for constitutional standing. This decision was clearly erroneous, since prudential standing is invoked only after a plaintiff is found to have the mininum article III standing. *See, e.g.,* Warth v. Seldin, 422 U.S. 490 (1975).

128. The "zone-of-interest" portion of the *Data Processing* test is still a significant part of the standing analysis. However, its use is limited to the prudential context since it is beyond the power of Congress to grant constitutional standing where none otherwise exists. *See* United States v. Richardson, 418 U.S. 166, 178 n.11 (1974); Sierra Club v. Morton, 405 U.S. 727, 732 n.3 (1971).

new test should overcome the tendency of sympathetic courts to minimize its application, as in the case of *Planning for People.*

The majority opinion in *Eastern Kentucky* has had the further beneficial effect of overriding the primary theoretical objection to the standing approach proposed in *Warth.* The objection was that the new test tended to focus on the merits of the dispute rather than on the suitability of the plaintiff to litigate it.[129] The *Eastern Kentucky* decision did not resolve the conflict between the direct injury-effective relief criteria and the often-stated theory that standing focuses on the claimant and not the claim asserted. What it did do was establish the former concept as the controlling test of federal standing in spite of any theoretical inconsistencies.

Resistance to the new test on the basis of its close relationship to the merits was strong during the period between *Warth* and *Eastern Kentucky.* Commentators criticized *Warth* for its apparent disregard of standing theory.[130] Similarly, lower courts hesitated to apply the strict rule of that decision, arguing that it demanded too much of the plaintiff at the pleading stage.[131] This undermined the *Warth* test by shifting the burden of establishing standing from the plaintiff to the court. Such an approach engenders criticism by negating the efficacy of direct injury-effective relief as a standing test and placing it in the realm of a cursory adjudication of the merits.

The effect of *Eastern Kentucky* has been to still the objec-

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129. *See, e.g.,* Comment, *supra* note 75, at 142-43.

130. *See, e.g.,* Broderick, *The Warth Optional Standing Doctrine: Return to Judicial Supremacy,* 25 CATH. U.L. REV. 467 (1976); Wolff, *Standing to Sue: Capricious Application of Direct Injury Standard,* 20 ST. LOUIS U.L.J. 663, 670, 674-75, 678 (1976); Comment, *Federal Standing 1976,* 4 HOFSTRA L. REV. 383 (1976).

131. *See, e.g.,* ACLU v. FCC, 523 F.2d 1344, 1348 (9th Cir. 1975); Malamud v. Sinclair Oil Corp., 521 F.2d 1142, 1150 (6th Cir. 1975); Planning for People Coalition v. Du Page City, Ill., 70 F.R.D. 38, 42 (N.D. Ill. 1976).

In *ACLU* the court claimed that, under the facts of that case, standing could not be determined, under the *Warth* approach, without deciding the dispute on the merits. As Judge Trask pointed out in his dissenting opinion, the real standing problem was that the petitioner failed to allege how the defendants' actions had caused or would cause injury to the ACLU or its members. The *Malamud* court's criticism of direct injury in fact directly attacked the problem by stating the opinion that any determination of directness necessarily requires a factual investigation.

The *Planning for People* court avoided this dilemma by making its own thorough investigation of the facts. The rationale given for this procedure was that, "although not specifically stated, the approach in *Warth* indicates that the district court should also look beyond the broad conclusory allegations of the complaint and should scrutinize the particular alleged facts to determine if they suggest a personal injury to the plaintiff which could be remedied by court intervention." 70 F.R.D. at 42.

tions based on standing theory without answering them. In this regard, it remains consistent with traditional development of standing doctrine. Previous tests have shown a similar relationship to the merits of a dispute and were extensively criticized for that reason.[132] Nevertheless, they prevailed. One such test was the "legal interest" approach which required a showing of injury to a legal right of the plaintiff.[133] In its purest form, this test mandated an injury which would support recovery by the plaintiff if the defendant were a private actor.[134] The effect of the "legal interest" test was to exclude all but a few categories of injury.[135] This necessarily amounted to a decision on the merits in the excluded cases since the deciding factor was not the posture of the plaintiff in relation to the claim asserted, but rather the very nature of that claim.

More recently, a two part nexus test was expounded in *Flast v. Cohen*,[136] which involved an initial appraisal of the substantive issues in the case. Initially, this test required that a taxpayer establish that the allegedly unconstitutional act was the result of an exercise of the taxing and spending power.[137] Additionally, it required the taxpayer to allege the violation of a specific constitutional limitation on the exercise of that power.[138] Thus, the standing question in taxpayer suits focused on the issue presented rather than on the plaintiff.

Assessing the directness of a plaintiff's injury and the court's ability to render effective relief does not require any greater adjudication of the merits than determining whether the interest asserted is a protectable one or whether it falls within the ambit of constitutional limitations on the taxing and spending power. If standing is denied under any of these theories, it is because the issues presented are not considered suitable for adjudication.[139] The plaintiff's suitability as an

132. Albert, *Standing to Challenge Administrative Action: An Inadequate Surrogate for Claim for Relief*, 83 YALE L.J. 425 (1974); Comment, *supra* note 75.

133. *See* WRIGHT, *supra* note 5, at 179.

134. *Id.*; Tennessee Elec. Power Co. v. TVA, 306 U.S. 118 (1939).

135. WRIGHT, *supra* note 5, at 179-80. The Court in *Tennessee Electric* phrased the scope of the test as follows: "The principle is without application unless the right invaded is a legal right,—one of property, one arising out of contract, one protected against tortious invasion, or one founded on a statute which confers a privilege." 306 U.S. at 137-38.

136. 392 U.S. 83 (1967). *See also* United States v. Richardson, 418 U.S. 166, 174 (1974).

137. 392 U.S. at 102.

138. *Id.* at 102-03.

139. *See* DAVIS TREATISE *supra* note 10, § 22, at 722 (Supp. 1970).

advocate of his position may be a prudential factor, but the basic consideration necessarily involves the merits.[140] To say that the direct injury-effective relief test is out of line with traditional standing concepts is thus to ignore the practical effect of previously prevailing standards. It would be better to accept the fact that standing does involve at least a superficial appraisal of the merits than to discard the new test on grounds which have never had any practical validity.

The Fully-Developed Test in Practice

The great merit of the direct injury-effective relief test is that it clarifies the role of the judiciary in factual situations which have previously proved difficult to analyze. What is more, in keeping with the theory that reduction in pressure on the judicial system comes not from denying standing in a particular case, but from excluding similar cases in the future by means of clear rules,[141] the new test provides a strict standard, while maintaining the degree of flexibility necessary to insure just decisions in infinitely varied factual situations.[142] However, if the approach to standing outlined in *Warth* and *Eastern Kentucky* is to have its maximum beneficial effect, it must be properly applied. Certain difficulties, actual and potential, have appeared in a minority of lower court cases. It is important that the questions presented by these decisions be resolved so that federal standing does not fall back into the state of confusion which has characterized it in the past.[143]

The efficacy of the new test is illustrated by *Bowker v. Morton*.[144] In that case, plaintiffs were small family farmers in California who were the beneficiaries of a federal irrigation project. Under federal law, the beneficiaries of the project were required to dispose of all land in excess of 160 acres at a price which assumed the unavailability of water. Plaintiffs brought suit to have this limitation applied to larger farmers who benefited from a state water project having no such limit. They claimed injury from their inability to buy land in the state project and alleged that such injury resulted from the fact that the federal restriction was not enforced against the larger farm-

140. *See* note 113 and accompanying text *supra*.
141. Scott, *supra* note 25, at 672-73.
142. *See* Leedes, *supra* note 76, at 289.
143. *See* text accompanying notes 153-168 *infra*.
144. 541 F.2d 1347 (9th Cir. 1976).

ers. The district court upheld the plaintiffs' standing on the basis of the *Data Processing* direct injury-zone of interest test.[145] The Ninth Circuit reversed, denying standing for failure to plead facts sufficient to meet the direct injury-effective relief requirement.[146]

On the facts of this case, it was plainly speculative whether granting the relief sought would enable plaintiffs to buy land in the state project.[147] They did not allege any efforts to buy or that the requested enforcement would result in prices they could, in fact, afford. In this situation, the new test proved effective in at least three respects. First, the court was spared the difficulty of assessing whether plaintiffs were within the zone of interests to be protected by the federal law. Second, the amorphous policy considerations inherent in the situation did not have to be resolved in a judicial arena designed for the resolution of more direct conflict. Third, the agencies involved were allowed the discretion properly afforded them in a tripartite system of government.

Although *Bowker* is perhaps the best example of the new test as a practically effective standard, that status is further confirmed by the already apparent frequency and consistency with which the test is applied throughout the federal court system.[148] This trend clearly demonstrates that there is a place for the direct injury-effective relief test in the doctrine of federal standing. Given this widespread acceptance, the issue then becomes whether this approach solves the uncertainty which plagued even the most clearly articulated of the prior standing tests.

ANALYSIS OF THE NEW TEST

In contrast to prior standards, the three part test dictated by *Warth* and *Eastern Kentucky* demands well defined allega-

145. *See* note 5 *supra*.

146. 541 F.2d at 1349-50.

147. *Id.*

148. *See, e.g.*, Arlington Heights v. Metropolitan Hous. & Dev. Corp., 429 U.S. 252 (1977); Harrington v. Bush, 553 F.2d 190 (D.C. Cir. 1977); Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year, 1975, 549 F.2d 1115 (7th Cir. 1977); Rental Hous. Ass'n of Greater Lynn, Inc. v. Hills, 548 F.2d 388 (1st Cir. 1977); Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976); Bowker v. Morton, 541 F.2d 1347 (9th Cir. 1976); Central South Carolina Chapter v. Martin, 431 F. Supp. 1182 (D.S.C. 1977); Rocky Ford Hous. Auth. v. United States Dep't of Ag., 427 F. Supp. 118 (D.D.C. 1977); NAACP v. Hills, 412 F. Supp. 102 (N.D. Cal. 1976); Rohm & Haas Co. v. International Trade Comm'n, 554 F.2d 462 (C.C.P.A. 1977) (per curiam).

tions which are clearly susceptible to evaluation by the courts. Evaluating the elements of previous standing tests often posed thorny problems for the courts. For example, the "zone of interest" portion of the *Data Processing* test often required thorough analysis of legislative intent.[149] This process was often complex and time consuming. Also, in many cases, it was impossible to determine conclusively that Congress meant to include a particular plaintiff within the ambit of a remedial statute.[150] Similarly, the question of whether a plaintiff had suffered an injury sufficient to motivate him to present his case vigorously, long the test of standing after *Baker v. Carr,* required a subjective determination which was difficult to make conclusively.[151]

The elements of the new, direct injury-effective relief test, on the other hand, are well within the evaluative competence of the courts. A number of recent decisions have addressed the question of whether the plaintiff's injury is sufficiently particularized to distinguish him from the general populace. While frequently litigated, this problem is well-defined and has seldom proved difficult to resolve, particularly in light of *SCRAP.* By the same token, the decisions required by the second and third elements are familiar to the courts and are particularly suited to judicial determination. Courts are accustomed to tracing the causal connection between action and injury. Similarly, since granting relief is the *raison d'etre* of the federal judiciary, it is unquestionably important that that relief be effective. By insuring that each decision makes a difference, the courts protect their own power and credibility. Although the courts may find difficulty in rendering authoritative decisions from reams of unverified and conflicting empirical data, evaluating the effectiveness of legal and equitable remedies poses no such problem.[152]

In spite of the fact that direct injury-effective relief test promises easier application and more definitive results than prior formulations, its ultimate boundaries are still undetermined. Certain factual situations raise questions concerning the proper application of the new criteria. In other instances,

149. *See* Hasl, *Standing Revisited—The Aftermath of Data Processing,* 18 ST. LOUIS U.L.J. 12, 33-39 (1973).

150. *See generally id.*

151. *See* Jaffe, *Citizen as Litigant, supra* note 101, at 1037-38; Comment, *supra* note 1, at 127-30.

152. But the likelihood of effective relief has not always been considered an element of standing. *See* note 86 *supra.*

lower federal courts have demonstrated a reluctance to treat the direct injury-effective relief test as determinative. Although the majority of standing decisions since *Eastern Kentucky* utilize the new test as the Supreme Court intended, the nature and frequency of the discrepancies is such that discussion of them here is warranted.

Particularized injury. One significant question which has arisen in recent standing decisions concerns the degree of harm necessary to satisfy the particularized injury portion of the standing test. This was the question posed in *SCRAP,* and it is frequently cited for the proposition that injury does not have to be substantial to support standing.

A workable approach to the particularized injury problem which remains consistent with the new test was presented in *Rental Housing Association of Greater Lynn, Inc. v. Hills.*[153] In that case, the owners and managers of apartments in Lynn, Massachusetts challenged the action of the Department of Housing and Urban Development in awarding financial assistance to a housing project which proposed to convert a factory into low income housing for the elderly. The owners and managers alleged that they would be injured by the resulting reduction in funds for further projects and by the possibility that they would lose tenants to the new project. The district court dismissed the suit for lack of standing.[154]

The court of appeals reversed, holding that although a mere reduction in available funds was not a sufficient allegation of particularized injury under *Eastern Kentucky,* competition and probable loss of tenants could serve as the basis for standing.[155] Citing *SCRAP,* the court observed that administrative action likely to cause harm could be challenged, even where specific proof of injury was not possible since the anticipated harm had not yet materialized.[156]

Other cases have further defined the extent of harm which will constitute particularized injury. In *Rocky Ford Housing Authority v. United States Department of Agriculture,* the owners of "qualified" housing were found to have standing to challenge the refusal of the Secretary of Agriculture to imple-

153. 548 F.2d 388 (1st Cir. 1977).

154. *Id.* at 389.

155. *Id.* at 389-90.

156. The defendants argued that the proposed project would be too small to have substantial competitive impact. The court replied that *SCRAP* clearly demonstrated that injury need not be substantial to support standing. *Id.* at 390.

ment a rural rent supplement program.[157] As in the *Greater Lynn* case, the possibility of economic harm was deemed a sufficient allegation of particularized injury.[158] Other grounds for standing have included an individual's first amendment interest in the right to publish and receive information[159] and an employee's psychological well-being and treatment at work.[160]

Direct injury. A second area of uncertainty in the new doctrine is the requirement that the harm alleged result directly from the challenged action. In *Warth,* the Court suggested that directness of injury in exclusionary zoning cases would depend on the existence of a particular project, and this has become the accepted standard for cases of that type.[161] No such criterion has been posited for the many other situations in which the question of directness may arise.

The problem is basically one of insuring that the alleged injury is adequately linked to the defendant's action without requiring detailed proof or an in-depth consideration of the merits at the pleading stage. Few cases have addressed this question directly. However, a possible standard of specificity was suggested in *Greater Lynn.* As outlined earlier, the plaintiffs in that case alleged that they would be injured by the loss of tenants to a new federally funded project. In light of these allegations, including the existence of sufficient low income housing in the community, the court said that it could "see no insurmountable obstacle to proof of the likelihood that Rental Housing Association's members will loose [*sic*] tenants to the 'Hoague-Sprague' project."[162]

In order to emphasize that its ruling was only an initial evaluation of the pleadings for the purpose of deciding the standing question, the court further insisted that its "opinion

157. 427 F. Supp. 118 (D.D.C. 1977).

158. *Id.* at 124 (economic harm or injury to statutory interest in providing low-income housing).

159. *See, e.g.,* Health Syss. Agency v. Virginia State Bd. of Medicine, 424 F. Supp. 256, 271-73 (E.D. Va. 1976).

160. *See, e.g.,* Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976). "Mere interest" however, will not support standing. Sierra Club v. Morton, 405 U.S. 727 (1972); Mulqueeny v. National Comm'n on the Observance of Int'l Women's Year, 1975, 549 F.2d 1115, 1121 (7th Cir. 1975).

161. *See* Note, *Standing to Challenge Exclusionary Land Use Devices in Federal Courts After Warth v. Seldin,* 29 STAN. L. REV. 323, 350-54 (1977). *See generally* Note, *The Causal Nexus: What Must be Shown for Standing to Sue in Federal Courts,* 29 U. FLA. L. REV. 250 (1977).

162. 548 F.2d at 389.

does not relieve plaintiff from the necessity of establishing in the record facts sufficient to confirm standing along the lines indicated, nor does it deny defendants the right to introduce contrary evidence. We, of course, express no views on the merits."[163]

This approach is entirely consistent with *Warth* and *Eastern Kentucky*. In those cases a possibly "insurmountable obstacle" did exist. In *Warth* the economics of the local housing market reduced the likelihood that a project suiting petitioners' needs would be constructed. In *Eastern Kentucky*, the Court could not say that the hospitals in question would not choose to forego favorable tax treatment. In contrast, *Greater Lynn* dealt with a situation in which injury was more likely than not.

By focusing on the existence or nonexistence of an "insurmountable obstacle" to proof of standing, a court can relieve some of the heavy pleading burden which Justice Brennan found so offensive in his *Warth* dissent.[164] This approach requires that plaintiffs show only that it is more likely than not that the alleged injury resulted from the challenged action. The result is that the directness of the injury is removed from the realm of "mere speculation" and actual proof is reserved to its proper place in the adjudication of the merits.

The "insurmountable obstacle" test applied in *Greater Lynn* reasonably mitigates the heavy pleading burden which might be imposed by a strict interpretation of *Warth* and *Eastern Kentucky*, but other cases show a tendency to overliberalize the new standing criteria. One or two decisions have simply assumed standing and gone on to decide the merits.[165]

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163. *Id.* at 391.

Language in *Rocky Ford* suggests that a similar test of probability rather than absolute proof, could be applied to the "effective relief" element. There the court required only that the plaintiffs show it was "more than speculative" that the exercise of the court's remedial powers would result in the availability of low cost housing to the plaintiffs. 427 F. Supp. at 424.

The *Greater Lynn* court's emphasis on the need for plaintiffs to prove the claims which entitle them to standing has been expressed in somewhat different terms by one commentator. He observed that the advance consideration of the effectiveness of the remedies sought, present in *Eastern Kentucky*, can be read in conjunction with *Rizzo v. Goode* to mean "that standing may be denied if, after litigation of the merits, the court concludes that none of the plaintiff's claims entitle them to relief." WRIGHT, *supra* note 5, at 37 (Supp. 1976).

164. 422 U.S. 490, 525-28.

165. *See, e.g.*, United Health Clubs of America v. Strom, 423 F. Supp. 761 (D.S.C. 1976); United States v. Lewisburg Area School Dist., 398 F. Supp. 948 (M.D. Penn. 1975), *rev'd*, 539 F.2d 301 (3rd Cir. 1976).

Others have found that the plaintiffs lacked standing, but have refused to consider that fact determinative and have decided the case on the merits nevertheless.[166] Another emphasized the fact that the question arose in the context of a motion for summary judgment and thus pointed out the possibility of misapplication of the new test in that context.[167]

The liberal treatment of the standing question by those courts which simply assume standing or ignore the lack of it is out of line with *Warth, Eastern Kentucky,* and general standing theory. First, by assuming standing and deciding a case on the merits, a court decreases the usefulness of the standing doctrine as a means of reducing the work load of the federal courts. Second, where a court proceeds to decide a case on other grounds after having determined that the plaintiff lacks standing based on the injury pleaded, it runs the risk of overemphasizing judicial economy, at the expense of leaving important separation of powers questions posed by the case unanswered.[168]

Despite those aspects of the new approach which need further clarification, the direct injury-effective relief test has supplied a manageable tool for handling complex standing problems. It seems clear that the test has gone a long way towards dispelling the uncertainty which traditionally plagued previously articulated standing tests.

CONCLUSION

In *Warth v. Seldin* and *Simon v. Eastern Kentucky Welfare Rights Organization* the Supreme Court expounded a new constitutional standing test. This approach reversed the previous trend toward liberalized standing by insisting that a plaintiff allege a particularized injury, directly resulting from

166. *See, e.g.*, City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976).

167. *See, e.g.*, Gray v. Greyhound Lines, East, 545 F.2d 169 (D.C. Cir. 1976). In the context of summary judgment, the potential for misapplication is inherent in the nature of the motion. On the defendant's motion for summary judgment, the burden is on him to show that he did not injure the plaintiff. His allegations will necessarily affect the adequacy of the plaintiff's pleading. This might cause a court to shift the standing focus from the plaintiff's pleading to that of the defendant. However, the fact that defendant fails to allege that plaintiff was not injured or that the injury was not a result of defendant's actions, should not be an excuse for the plaintiff's failure to plead with the specificity demanded by *Warth* and *Eastern Kentucky*. This seems reasonable since even if the defendant fails to carry his burden, a summary judgment is proper if the plaintiff does not meet his pleading requirements. *See also* 426 U.S. at 37 n.15.

168. *See* City of Milwaukee v. Saxbe, 546 F.2d 693 (7th Cir. 1976).

defendants' action and redressable by the remedy sought.

The direct injury-effect relief test lacks support in precedent, but the concern with separation of powers which forms its basis is well-grounded in standing theory. After *Warth* and prior to *Eastern Kentucky* the new standard was much criticized, partially because it was a departure from prior case law and partially because it threatened to result in cursory adjudication of the merits. Critics also contended that the new test would be used as a means of avoiding complex constitutional questions.

Clarification of the direct injury-effect relief criteria in *Eastern Kentucky* stilled the bulk of this opposition. The lower courts had demonstrated some reluctance to apply the rule outlined in *Warth,* but reiteration of that test in *Eastern Kentucky* provided more distinct guidelines. *Eastern Kentucky's* nonconstitutional context also helped establish direct injury-effective relief as a true standing test rather than a means of avoiding constitutional issues. Furthermore, the interrelationship of standing and the merits had never proved fatal to prior standing tests, and *Eastern Kentucky* showed that the same was true of the new one.

The direct injury-effective relief test has proved effective both as an aid in establishing strong precedents for future standing decisions and as a means of resolving complex separation of powers problems. Courts are familiar with the determinations required by the new test and can make them competently and comfortably. By the same token, the direct injury-effective relief analysis screens out issues more amenable to legislative or political treatment and helps to insure that the courts will handle only those matters for which they were designed.

Although the approach introduced by *Warth* and *Eastern Kentucky* dispells much of the confusion which previously characterized the law of federal standing, some aspects of the test require further clarification. The degree of specificity required in the pleadings is still at issue. One realistic solution which has been suggested is that plaintiff must at least show that there is no "insurmountable obstacle" to proving that he has suffered harm as a result of defendant's actions.

Another question yet unresolved concerns the extent of harm necessary to support standing. Cases following *SCRAP* have determined that minimal harm will usually suffice. For instance, the possibility of economic harm or allegations of injury to mental well-being have been accepted.

A tendency to liberalize the strict requirements articulated in *Warth* and *Eastern Kentucky* has appeared in a few lower court cases. One observable inconsistency is the practice of assuming standing and passing on to the merits of the case. This approach tends to devalue standing as a tool for screening out similar cases in the future and reducing the workload of the federal judiciary.

Courts may also avoid or reduce the efficacy of the new test by failing to treat it as dispositive. In such situations a court will find that a plaintiff lacks standing but proceed to decide the case on the merits nevertheless. Although the asserted rationale for this practice is a desire to avoid prolonged litigation where amendment of the pleadings to state standing grounds is a possibility, reluctance to decide cases on the standing issue can result in a failure to fully examine possible separation of powers questions.

Numerous lower court cases have applied the direct injury-effective relief test since *Warth* and *Eastern Kentucky* were decided. A review of these cases shows the difficulties inherent in the new standard to be surprisingly slight and few. Unquestionably, this efficiency in an area of the law previously considered amorphous and obscure stems from the fact that the new test is strict and clearly articulated, yet flexible at the same time. It appears likely that the doctrine of standing will remain anchored to *Warth* and *Eastern Kentucky* for a long time to come. In any event, the direct injury-effective relief approach is not the "further obfuscation of the law of standing" lamented by Justice Brennan. At best, it may be the long-sought formula which will establish standing as a vigorous and useful concept in the federal courts.

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